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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIO MIXCO,

Defendant and Appellant.

B208663

(Los Angeles County
Super. Ct. No. KA080364)

In re JULIO MIXCO,

on Habeas Corpus.

B218616

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Horan, Judge. Affirmed.

ORIGINAL PROCEEDING. Petition for habeas corpus. Petition denied.

Fay Arfa for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Kenneth C. Byrne and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Julio Mixco was convicted of attempted robbery (Pen. Code,¹ § 664/211) with the personal use of a knife in the commission of the offense (§ 12022, subd. (b)(1)). On appeal, Mixco claims that his conviction should be overturned because it was based on insufficient evidence and because his counsel rendered ineffective assistance. By petition for habeas corpus, Mixco reasserts his ineffectiveness claims. We affirm the judgment and deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

On August 31, 2007, at approximately 9:15 p.m., Victor Melendez and his wife Roxana Melendez were in the well-lit garage area of the apartment building in which they lived in El Monte. Victor² was retrieving something from the garage while Roxana awaited him in the passenger seat of their car. Victor noticed two men approaching and turned to enter his car. As he did so, one of the men, Mixco, placed an object to Victor's back and demanded his money. The other man observed from behind the car. Victor believed that the object pressed to his back was a gun. Roxana could see that it was a knife.

Victor turned to Mixco, looked him in the face, and asked why he wanted Victor's money. Mixco had been attempting to conceal part of his face by holding up a white T-shirt, but during the incident, Mixco stopped holding the shirt over his face and his face was uncovered. Roxana saw his whole face.

Mixco was wearing a white tank top with jeans. He had extensive tattoos running from his shoulders down both arms. Victor did not give Mixco anything; he was trying to stall, to see if he could end the encounter without relinquishing his valuables. After about 30 seconds, Mixco and the other man fled; Mixco on foot and the other man on a bicycle.

¹ Unless otherwise indicated, all statutory references are to the Penal Code.

² Because the Melendezes share a last name, we use their first names for clarity.

The Melendezes followed the assailants in their car, and Roxana called 911. They followed the men until police officers took over the chase. After about 30 minutes, they saw Mixco being apprehended by a canine unit in a field near a wash, and then they identified him on the scene. Mixco was wearing the clothes he had been wearing during the incident. The police found a white T-shirt approximately 10 to 15 yards from the spot where Mixco was captured.

By information Mixco was charged with attempted robbery, with several enhancement allegations relating to prior offenses, convictions, and prison terms. Victor and Roxana both identified Mixco as their assailant in court. Mixco presented no defense, relying instead on the state of the evidence. Mixco was convicted of attempted robbery and the knife use allegation found true. He admitted his prior convictions.

Prior to sentencing, Mixco obtained new defense counsel, who filed a new trial motion alleging insufficient evidence and ineffective assistance of counsel. Mixco was sentenced to 11 years in state prison. He appeals.

DISCUSSION

I. Sufficiency of the Evidence

Mixco argues that the evidence was not sufficient to support a conviction for attempted robbery because it was based on eyewitness identifications that were unreliable because the incident took place at night, there were multiple assailants, and events happened quickly. Other factors, Mixco claimed, “detracted” from the identifications: the suggestiveness of the field identifications, Roxana’s focus on the weapon, the fact that the witnesses saw Mixco being arrested, and the fact that Mixco was wearing a white shirt and dark pants. Mixco concludes that the Victor and Roxana’s testimony was “uncorroborated, conflicting, [and] flimsy evidence [that] failed to prove appellant’s involvement in the charged offenses.”

“When a jury’s verdict is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support it, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the jury.” (*People v. Brown* (1984) 150 Cal.App.3d 968, 970.) We review the record in the light most favorable to the judgment and determine whether it discloses substantial evidence such that a rational trier of fact could find Mixco guilty beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

We conclude that the evidence is sufficient to sustain Mixco’s conviction. Both Victor and Roxana identified Mixco as the man who tried to rob Victor. They testified that they were able to see his face during the incident in the well-lit garage, and they correctly identified both his attire and his arm tattoos. They testified that Mixco used a weapon to threaten Victor and demanded his belongings. They also testified that they followed Mixco when he fled and helped the police to locate him. Their description of him matched his appearance when he was found, including the T-shirt recovered from an area near Mixco’s hiding place. On appeal, we may not reject testimony believed by the jury unless it is physically impossible or obviously false. (*People v. Friend* (2009) 47 Cal.4th 1, 41.) “Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.” (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

Mixco argues that the witnesses’ testimony contained an inherent contradiction because he was supposed to be holding a weapon to Victor’s back and a T-shirt over his face during the attempted robbery. According to Mixco, he would have been unable to commit that offense because he would have no hands available. Not only does this misstate the evidence, because Victor testified that Mixco removed the T-shirt during the attempted robbery, but also Mixco’s argument merely exposes a possible conflict in the

evidence that was resolved against him by the jury at trial. That is the jury's role. (*People v. Friend, supra*, 47 Cal.4th at p. 41.) The evidence is sufficient to support the jury's finding that Mixco attempted to rob Victor.

II. Ineffective Assistance of Counsel

The remainder of Mixco's appeal and the entirety of his petition for habeas corpus focus on the allegation that Mixco's trial counsel rendered ineffective assistance. All Mixco's evidence to establish ineffectiveness was submitted to the trial court with Mixco's new trial motion; no further evidence was submitted to this court with Mixco's habeas corpus petition. As the record and the arguments are identical for both the appeal and the writ petition, we consider them together.

To establish ineffective assistance of counsel, Mixco must demonstrate that "(1) counsel's representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation subjected the petitioner to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the petitioner." (*In re Jones* (1996) 13 Cal.4th 552, 561.)

Mixco alleges that his original trial counsel provided ineffective assistance when he failed to present an eyewitness identification expert; declined to make an opening statement; rested on the state of the evidence rather than presenting allegedly exculpatory evidence; failed to cross-examine witnesses adequately; and failed to present an adequate closing argument. Mixco has not established ineffective assistance of counsel here.

A. Failure to Present an Eyewitness Identification Expert

Mixco contends that an eyewitness identification expert "would have greatly assisted the defense by explaining the deficiencies of eyewitness identification to the jury." He outlines in great detail the information to which a psychologist he has since

consulted would have testified at trial, then summarily concludes that the failure to call such an expert constituted ineffective assistance. Mixco has not demonstrated “a reasonable probability that, but for counsel’s failings, the result would have been more favorable to the petitioner.” (*In re Jones, supra*, 13 Cal.4th at p. 561.)

B. Failure to Act as an Advocate

Mixco asserts that his counsel failed to do anything to assist him except to appear at trial, specifically complaining that his counsel failed to make an opening statement, to competently present a defense, to cross-examine witnesses sufficiently, and to present an effective closing argument.

Mixco’s only basis for arguing that his counsel’s choice to reserve opening argument amounted to a deficient performance is the fact that one practice manual counsels against waiving the opening statement. Whatever the merits of that general advice, Mixco has not established that the reservation of opening argument (here, followed by the decision to rest on the state of the evidence) in this case fell below an objective standard of reasonableness under prevailing professional norms. (*In re Jones, supra*, 13 Cal.4th at p. 561.)

Mixco next complains that his counsel failed to “present a defense,” but his entire argument is a reference to other portions of the brief. Similarly, he includes a subheading asserting that counsel failed to cross-examine witnesses, but again offers no argument, merely another reference to another section of his briefing. Last, he contends that his counsel failed to present an effective closing argument, this time referring to a different section of his brief. As Mixco has offered no argument or citations to facts or law to support any of these assertions under the allegation of failure to act as an advocate, we will address those arguments in other portions of this opinion. With this showing Mixco has not demonstrated that his counsel failed to act as his advocate or provided ineffective assistance.

C. Failure to Prepare and Present a Defense

Mixco argues that “a vast abundance of exculpatory evidence existed” but was not presented. Specifically, Mixco argues that counsel should have offered as evidence: the 911 calls made by two other people on the night of the offense; the testimony of Mixco’s common law wife, Lucy Herrera; the testimony of Mixco’s employer; Mixco’s “distinctive features”; and photographs of the scene at night. Mixco has not established ineffectiveness here.

1. Telephone Calls

Mixco alleges that Track No. 1 of the 911 tape “contained statements from Roxana saying that someone tried to car jack them.” According to Mixco, these statements “contradicted Roxana’s belief that an attempted robbery occurred and that she actually saw the attempted robbery and heard the perpetrators speak to her husband. Track No. 1 would have diminished Roxana’s credibility by showing that she never actually heard or saw what happened during the incident.” The audio recording was not submitted to this court, but we have reviewed the transcript of this track and see no instance in which Roxana or any female asserted that an attempted carjacking had occurred. The transcript reflects a female voice saying, “[S]omebody is trying to rob us” and then a male voice saying “Hello” and “Somebody tried to car jack.” As the evidence submitted to this court does not appear to substantiate Mixco’s contention that the track contains contradictory statements by Roxana, Mixco has not established any ineffectiveness here.

Track No. 2, Mixco asserts, contains statements by a witness who said he saw three men jump in to the wash near where Mixco was ultimately found and that they left a shirt hanging on the fence when they went over the fence. According to Mixco, this evidence should have been presented because Victor and Roxana testified about only two men, so this evidence would have allowed the jury to conclude that a different set of men jumped into the wash for reasons unconnected with the attempted robbery. While this

evidence would support an argument and inference that there were two sets of men fleeing the apartment building at once, it also carried a downside for Mixco: the caller confirmed that the T-shirt found at the scene was dropped by the men who jumped into the wash near where Mixco was found, corroborating the evidence recovered by the police and identified by Victor and Roxana and connecting Mixco to the T-shirt he is said to have used to attempt to conceal his face during the attempted robbery. In light of the unfavorable link the call made between Mixco and the physical evidence and the speculative argument of multiple bands of fleeing men, we cannot say that this tactical decision by counsel fell below an objective standard of reasonableness.

Last, Track No. 3 contained a call by a person reporting that two men had chased his cousin. The description given by the caller of the two men matched the description of Mixco and his companion: the first man was described as Hispanic, wearing a white shirt and blue pants, and on a bicycle. The second man, also Hispanic, also wore a white shirt and had a full-arm tattoo. The man with the tattoos made motions suggesting he was about to pull a weapon from his waistband. Mixco argues that this call “would have demonstrated that, in fact, the other Hispanic men committed the crime and could have been identified by other percipient witnesses. The 911 tape proved that someone other than appellant committed the crime.” We fail to see how this call proved what Mixco contends it does. From the evidence presented, it seems to be just as susceptible of interpretation as suggesting that Mixco and his companion were up to more than just an attempted robbery that night. Under these circumstances, we cannot conclude that the tactical decision not to play these tapes for the jury constituted a deficient performance by counsel or that the decision prejudiced Mixco’s defense in any way.

2. Witnesses Lucy Herrera and David Chee

Mixco submitted the declaration of Lucy Herrera, who identified herself as his common law wife. She declared that on the date of the incident, she had seen Mixco at his work in South El Monte at about 5:00 p.m. She spoke to him on the telephone later

that evening, and she understood that Mixco would walk from their home to her parents' house in Rosemead that evening, a 30 minute walk. After they spoke on the telephone, she did not hear from him again. At about 9:15 p.m., Herrera and her father decided to look for Mixco. As they drove, she saw Mixco being arrested. Although Mixco describes this as "critical testimony" about why appellant had been in the area of on the date of the incident, the testimony is not exculpatory. It establishes that Mixco was out of touch with Herrera at the time of the crime and tended to show that Mixco had the opportunity to commit the attempted robbery. While Herrera's testimony would have offered counsel a basis to argue that there was another reason that Mixco was in this area of El Monte, Mixco has not demonstrated that it would have offered an explanation as to why he was found lying down in a field, or that it would have established that he could not have committed the offenses.

Mixco also claims that counsel should have presented evidence from his employer, who could have testified that Mixco was good at his job; worked that day until 5:00 p.m., wore shirts that covered his tattoos; and had a missing front tooth. Mixco claims that this would have established that he lacked any motive to commit a robbery and that Victor mistakenly identified Mixco because Victor never mentioned his assailant lacking a front tooth. Some of the testimony is irrelevant—motive, for instance, is not an element of robbery (*People v. Wilson* (2008) 43 Cal.4th 1, 22), and what Mixco customarily wore to work has no connection to what he might have been wearing hours later. Based on the nature of this unpresented evidence and the evidence of Mixco's participation in the event, we cannot say that Mixco has demonstrated that the evidence should have been presented, or that if it had been offered, the result would have been more favorable to him. (*In re Jones, supra*, 13 Cal.4th at p. 561.)

3. Evidence of Mixco's Appearance

Mixco contends that his trial counsel should have presented evidence of a gap in his front teeth; tattoos on his chest of the number "69," the name "Lucerena," an image of

lips or lipstick, and the letters “SGV”; and of piercings in his neck and ear. None of these features were included in the description of him given by Roxana or Victor, so, Mixco contends, this evidence would show that someone else committed the crime. But Victor and Roxana identified Mixco as the assailant before trial and at trial, and that identification was corroborated by some additional evidence. The fact that they may have omitted from their descriptions additional tattoos or a missing tooth does not mean that the identifications were mistaken. As such, counsel’s decision not to present this evidence of additional tattoos, piercing, and a missing tooth does not constitute a deficient performance, nor does it demonstrate a reasonable probability that the outcome of the trial would have been different if the evidence had been presented. (*In re Jones*, *supra*, 13 Cal.4th at p. 561.)

4. Photos of the Scene Taken at Night in the Wintertime

Mixco claims that his counsel should have offered into evidence photos of the garage taken by Herrera’s sister at 9:00 p.m. in February 2008. Mixco claims that the photographs would have impeached Victor and Roxana’s testimony that the area was well-lit. Although Mixco claims without citation to the record that the prosecution’s photographs were taken in daylight, Mixco has not established that they were an inaccurate representation of the location of the incident. Moreover, Mixco has not established that the photographs he claims should have been offered accurately represented the conditions of or the location where the incident occurred at the time of the attempted robbery. Notably, his photographs were taken at 9 p.m. on a winter night although the incident took place on a summer night, meaning that these photographs were taken under significantly different lighting conditions from those at the time of the attempted robbery. Accordingly, we cannot say that counsel should have presented these photographs or that the result of the trial would have been more favorable if counsel had done so. (*In re Jones*, *supra*, 13 Cal.4th at p. 561.)

D. Failure to Adequately Confront and Cross-Examine Witnesses

Mixco argues that his original trial counsel failed to adequately cross-examine the police officers who testified at trial. He claims that counsel was trying to achieve several goals during the cross-examination, but failed to do so: to show not that the area had a high crime rate, but that other Hispanic persons in the area could have committed the crime; that various gang members frequented the area and that they commonly dressed in white T-shirts and dark pants; and that many other Hispanic persons in the area had extensive tattoos on their arms. But Mixco offers no evidence to support his claim that counsel was trying to achieve these goals during his cross-examination—there is no declaration from counsel in the record, and Mixco cites to nothing to support his assertions.

Moreover, Mixco observes that his original counsel never asked unspecified “witnesses” (it is not clear whether he still means the police officer or now means the Melendezes) whether they saw other tattoos on the assailant, referring back to Mixco’s argument that because he had other tattoos that were not mentioned by the witnesses he could not have been the assailant. None of this evidence would have changed the facts that the police arrested Mixco after taking over the chase from the Melendezes; that they found Mixco hiding, sweating, in a field; that he matched the description provided by the Melendezes; and that he was identified, in the field and in court, as the man who attempted to rob Victor. Mixco has not shown that was deficient or that questions on the subjects he identifies here would have resulted in a favorable verdict.

E. Failure to Present an Adequate Closing Argument

Mixco argues that in closing, his original trial counsel failed to highlight the deficiencies in the eyewitness identification; to point out how short the observation period was; to focus on unidentified “inconsistencies” between the two witnesses’ accounts; to advise the jury that the witnesses could have seen the tattoos during the field

identification; and to stress that the witnesses had looked at photographs of the tattoos before testifying. He complains that his counsel failed to adequately explain “the concept of reasonable doubt, of credibility of witnesses or the factors influencing eyewitness identification.” He points out that his counsel did not “show” that the witnesses lost sight of the assailant and could have identified the wrong man, nor did he highlight the “improbability” of holding a T-shirt over one’s face while committing a robbery. Because the jury returned a verdict in 15 minutes, he contends that counsel failed to cause the jury to deliberate and deprived him of the effective assistance of counsel.

“The right to effective assistance extends to closing arguments.” (*Yarborough v. Gentry* (2003) 540 U.S. 1, 5.) “Nonetheless, counsel has wide latitude in deciding how best to represent a client, and deference to counsel’s tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage.” (*Id.* at pp. 5-6.) Our review is, therefore, “highly deferential.” (*Id.* at p. 6.) A review of the closing argument demonstrates that counsel did challenge the evidence against Mixco in his closing argument. He argued that the witnesses were confused and that the identifications were both tainted and unreliable due to the conditions under which they were obtained. He discussed inconsistencies in the witnesses’ testimony and the fact that no weapon was introduced into evidence. Although brief, counsel’s closing argument served its purpose of sharpening and clarifying the issues that the jury was charged with deciding. (*Ibid.*) Mixco has not established a deficient performance by counsel in this regard.

III. Cumulative Error

We reject appellant’s final contention that the cumulative effect of the claimed errors deprived him of due process of law and a fair trial. Although the cumulative effect of multiple errors may constitute a miscarriage of justice, “[i]f none of the claimed errors were individual errors, they cannot constitute cumulative errors” (*People v. Beeler* (1995) 9 Cal.4th 953, 994.)

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.